IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 729

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DONALD BACHELLAR, *et al.*,

SE NOT PRINTED *Petitioners,*

—v.—

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF FOR PETITIONER

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Opinions Below

The opinion of the Court of Special Appeals of Maryland affirming petitioners' convictions of disorderly conduct is reported at 3 Md. App. 626, 240 A.2d 623, and appears in the Appendix [hereinafter cited as A. ——] at A. 171.

The order of the Court of Appeals of Maryland denying certiorari to review the judgment of the Court of Special Appeals was rendered without opinion. It is unreported and appears at A. 182.

Jurisdiction

The Court of Appeals of Maryland denied review on November 26, 1968. Petition for a writ of *certiorari* was filed in this Court on February 19, 1969, and was granted on October 13, 1969. The Court's jurisdiction rests upon 28 U.S.C. § 1257(3) (1964), petitioner having asserted below and asserting here the deprivation of rights secured by the Constitution of the United States.[1]

Questions Presented

1. Petitioners were convicted of the offense of disorderly conduct on the basis of events which occurred during a demonstration protesting the Viet Nam War at a United States Army recruiting center. The statute involved defines disorderly conduct as "acting in a disorderly manner to the disturbance of the public peace." It has been interpreted judicially to mean (i) "doing or saying, or both, of that which offends, disturbs, incites, or tends to incite a number of people gathered in the same area," or (ii) refusing "to obey a policeman's command to move on when not to do so may endanger the public peace." Is this statute unconstitutional on its face, as construed by the highest court of the State, or as applied to these petitioners, by force of the First and Fourteenth Amendments?

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[1] Because the Court of Appeals of Maryland declined to exercise its discretionary jurisdiction to review the final judgment of the Court of Special Appeals, this Court's writ properly runs to the latter court. *Virginian Ry. Co.* v. *Mullens*, 271 U.S. 220, 222 (1926); *Lee* v. *Florida*, 392 U.S. 378 (1968). The petition for *certiorari* was timely filed here within ninety days following the order of the Court of Appeals. *American Railway Express Co.* v. *Levee*, 263 U.S. 19, 20-21 (1923); *Smith* v. *Illinois*, 390 U.S. 129 (1968).

2. The persons alleged to have been "offended, disturbed, or incited" because of petitioners' actions were members of a crowd of unsympathetic spectators. The record is clear that whatever offense, disturbance or incitement was felt by the crowd was occasioned solely by its opposition to the ideas expressed by petitioners: specifically, their anti-war views. On this record, was the disorderly conduct statute applied in violation of the First and Fourteenth Amendments because it was employed to punish petitioners for ideas and opinions deemed to create a public disturbance?

3. The prosecution's evidence tended to show that petitioners "offended, disturbed, or incited" a crowd of spectators by force of their expressed anti-war views. Petitioners' evidence tended to show that the only ground upon which the spectators were disturbed was hostility to the content of petitioners' ideas. Petitioners therefore requested jury instructions to the effect that petitioners had a right to express their political views and ideas, and could not be punished or ordered to leave the street solely because those ideas induced a condition of unrest, dispute or anger in other people. The requested instructions were cast precisely in the language of this Court's decision in *Terminiello* v. *City of Chicago*, 337 U.S. 1 (1949). Did the trial court err constitutionally in refusing to give these instructions?

Constitutional and Statutory Provisions Involved

This case involves the First Amendment and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

It also involves the italicized portion of the following Maryland statute:

MARYLAND CODE ANNOTATED, ART. 27 § 123
(1967 Repl. Vol.)

§123. Drunkenness and disorderly conduct generally; habitual offenders.

"Every person who shall be found drunk, or *acting in a disorderly manner to the disturbance of the public peace, upon any public street or highway, in any city, town or county in this State,* or at any place of public worship or public resort or amusement in any city, town or county of this State, or in any store during business hours, or in any elevator, lobby or corridor of any office building or apartment house having more than three separate dwelling units in any city, town or county of this State, and any person who drinks, or has in his possession, any intoxicating beverages while in attendance as a spectator or otherwise, at any place where an elementary school, junior high school or high school athletic contest is taking place, *shall be deemed guilty of a misdemeanor;* and upon conviction thereof shall be subject to a fine of not more than fifty dollars, or be confined in jail for a period of not more than sixty days or be both fined and imprisoned in the discretion of the court. Habitual offenders may be fined not more than one hundred dollars or committed to jail or the Maryland House of Correction for not more than six months. An habitual offender is a person who shall have been convicted under the provisions of this section five (5) times in the preceding twelve (12) months. The trial magistrates of the respective counties of this State shall have concurrent jurisdiction

over such offense with the circuit court for their respective counties." (Emphasis added.)[1]

Statement

A. History of the Proceedings

On April 19, 1966, the six petitioners were found guilty of disorderly conduct under Md. Code Ann., Art. 27, § 123 (1967 Repl. Vol.) in the Municipal Court of Baltimore, Criminal Division. (A. 5.) Each was sentenced to imprisonment for sixty days in the Baltimore City Jail and a fine of $50 and costs. (A. 5.) Each noted a timely appeal for trial *de novo* in the Criminal Court of Baltimore City. (A. 7.)[2]

On June 6, 1966, petitioners moved the Criminal Court to dismiss the prosecution on the ground that Art. 27, § 123, on its face and as construed by the Court of Appeals of Maryland, abridged their rights of free speech, petition and assembly, and was vague, indefinite and overbroad, in violation of the First and Fourteenth Amendments. (A. 7-8.) The motion was denied on June 8. (A. 18-19 [Tr. 3-4].)

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[1] The statute is set forth as it read prior to July 1, 1968. An amendment of that date, Md. Laws 1968, ch. 146, § 3, revised the section so as to enumerate in subsections the several distinct offenses that the statute condemns. The prohibition against acting "in a disorderly manner to the disturbance of the public peace, upon any public street, highway . . ." etc. is carried forward unchanged in subsection (c). See Md. Code Ann., Art. 27, § 123 (1969 Cum. Supp.).

[2] The docket entries, commitments and notices of appeal were separate but identical for each petitioner. The Appendix reproduces these documents in the Bachellar case only, as representative of the documents in each petitioner's case.

The cases were tried jointly to a jury between June 8 and June 13. At the conclusion of the State's case, petitioners moved in writing for a "judgment of acquittal or for dismissal on the evidence." This motion challenged not merely the sufficiency of the evidence but also the constitutionality of Art. 27, § 123, on its face and as applied to the facts shown by the State's proof. It invoked the First and Fourteenth Amendments and the doctrines of vagueness and overbreadth. (A. 9-11.) The motion was denied (A. 80 [Tr. 169]), renewed at the close of all the evidence (A. 153 [Tr. 362]), and again denied (*ibid.*).

Petitioners submitted written requests for instructions based upon the language of this Court in *Terminiello* v. *City of Chicago*, 337 U.S. 1 (1949). As we shall see below, the offense of disorderly conduct may be made out, under Maryland law, pursuant to either of two theories. The first theory involves "offending, disturbing or inciting" the public. The second involves disobeying a police order under circumstances likely to cause a disturbance. Petitioners' requested instructions sought to limit each theory to a compass consistent with the First and Fourteenth Amendments.

Requested Instructions I through IV-A dealt with the disobeying-a-police-order theory, and asked that the jury be charged as follows: *first*, that the petitioners could not be convicted unless they disobeyed "a reasonable and lawful police order," clearly communicated to them (Requested Instruction I); *second*, that a police order to disperse is reasonable and lawful only "if it is made to prevent an imminent public disturbance, and if it is reasonably necessary in order to prevent such a disturbance" (Requested Instruction II); and *third*, that a "public disturbance," for this pur-

pose, means "physical violence, or the attempt to use physical violence," and not merely "an episode of shouting or singing or name-calling not calculated to spill over into imminent violence" (Requested Instruction III). Requested Instruction IV said that the police could not order petitioners to move on if petitioners "were doing only what they had a right to do" [4] even though petitioners might thereby "anger others and make others want to resort to violence." It added that: "In such a case it is the obligation of the police to protect the citizen from violence by others, and they may not tell him to stop doing what he is doing, or to move along or go away merely because of threats of violence by others."

Requested Instruction IV-A was an alternative to IV. It conceded that the police might sometimes lawfully order an individual to desist from conduct on the ground that his conduct was arousing others to violence against him; but it insisted that a police order of this sort could not be given "unless the police reasonably believe that it is impossible to prevent violence from occurring by restraining only those persons who are threatening violence." [5]

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[4] One part of the purpose of Requested Instruction VII, *infra*, was to define the scope of petitioners' First Amendment rights for purposes of this Requested Instruction IV. Another purpose of Requested Instruction VII was to delimit the disturbing-the-public theory of disorderly conduct consistently with the First Amendment.

[5] Requested Instruction IV-A continued: "In such a case, the police are obligated first to attempt to quell the danger of violence by telling those persons who are threatening violence to move along or disperse, and by restraining or arresting them if necessary and if practicable, before they may order persons to stop doing acts which are themselves peaceful and which threaten to lead to a disturbance only because they anger others."

Alternative Instruction I-A covered the disturbing-the-public theory of disorderly conduct. It would have permitted conviction of the petitioners if they either (1) disobeyed a police order (within the limitations described above), or "(2) knowingly and purposely engaged in acts which they had no lawful right to do, and which were calculated and likely in themselves to lead to an imminent public disturbance [as defined above]; or (3) knowingly and purposely engaged in acts which they had no lawful right to do, and which obstructed or hindered pedestrians or traffic." Again, however, it would have imposed the limitation that petitioners could not be convicted under the second theory, disturbing the public, "if they were doing only what they had a right to do," although they might thereby "anger others and make others want to resort to violence." [6]

Requested Instructions V through VII governed both the disobeying-a-police-order and the disturbing-the-public theories of disorderly conduct. They were as follows:[7]

"INSTRUCTION V.

"Under no circumstances may you convict these defendants if the only conduct of theirs which was likely to lead to an imminent public disturbance was the expression of views or ideas which other people did not like or resented, or which stirred other people to anger

[6] The quoted language is from Requested Instructions IV and IV-A, which would have been modified by I-A to apply to the disturbing-the-public theory as well as to the disobeying-a-police-order theory.

[7] The bracketed language in the following instructions would have been inserted by I-A to adopt V through VII to the disturbing-the-public theory as well as the disobeying-a-police-order theory.

or violence. The defendants may be convicted only if their conduct, or their manner of expressing their ideas was offensive and likely to lead to a public disturbance, and not if it was the ideas themselves that they were expressing or supporting, which were likely to create a public disturbance. Where conduct—in this case the physical acts of the defendants—is likely to lead to imminent public disturbance, [that conduct is disorderly conduct; also] the police may order it stopped, and the refusal to obey such an order is disorderly conduct. But where the danger of imminent public disturbance created by an individual arises from the ideas or the views or beliefs which he expresses, he may not be required to stop and is not guilty of disorderly conduct [for expressing those views or] for refusing to obey a police order to stop expressing his views.

"INSTRUCTION VI.

"Specifically, I charge you that if the only threat of public disturbance arising from the actions of these defendants was a threat that arose from the anger of others who were made angry by their disagreement with the defendants' expressed views concerning Viet Nam, or American involvement in Viet Nam, you must acquit these defendants. And if you have a reasonable doubt whether the anger of those other persons was occasioned by their disagreement with defendants' views on Viet Nam, rather than by the conduct of the defendants in sitting or staying on the street, you must acquit these defendants.

"INSTRUCTION VII.

"The defendants at all times had a legally protected right to set forth their political views, beliefs or ideology even if the result was to induce a condition of unrest, create dissatisfaction in others, invite dispute, or even stir people to anger at their views. If they did nothing more to create a public disturbance than to exercise this right, [they are not guilty of disorderly conduct;] the police could not lawfully order them to move along or go away, and they are not guilty of disorderly conduct for disobeying such a police order."

All of these requested instructions (A. 12-16) were refused. (A. 17, 153-154 [Tr. 362-363].) In a bench conference, defense counsel pointed out to the court that the refusal of his requests "deprives the defendants of procedural due process in that the law with respect to disorderly conduct is so vague, so indefinite, that . . . it becomes impossible for defense counsel, without knowing what the Court's instructions are going to be, to properly argue to the jury." (A. 154 [Tr. 363].) The court responded:

". . . I intend to tell the jury that disorderly conduct is the doing or saying or both of that which offends, disturbs, incites or tends to incite a number of people gathered in the same area. It is conduct of such a nature as to affect the peace and quiet of persons who may witness it and who may be disturbed or provoked to resentment because of it. A refusal to obey a policeman's command to move on, not to do so may endanger the public peace may amound [sic] to disorderly conduct.

"Now you know what the definition is. . . ." (A. 154 [Tr. 363-364].)

The court's entire charge to the jury with regard to the definition of the offense of disorderly conduct was as follows:

> " . . . I . . . invite your attention to the fact that each of the six defendants on trial before you today is charged with the crime known as disorderly conduct. Therefor [sic] it becomes necessary that I advise you as to what is meant by disorderly conduct.
>
> "At common law there was no offense known by that term. In more recent times, however, the charge is contained in a statute known as Section 123 of Article 27 of the Maryland Annotated Code. The essential parts of this statute I will now read to you.
>
> " 'Every person who shall be found acting in a disorderly manner to the disturbance of the public peace upon any public street or highway in any city, town or county in this state shall be deemed guilty of a misdemeanor'.
>
> "That misdemeanor is known as disorderly conduct. In further amplification of the meaning of the charge, I instruct you that disorderly conduct is the doing or saying or both of that which offends, disturbs, incites or tends to incite a number of people gathered in the same area. It is conduct of such nature as to affect the peace and quiet of persons who may witness it and who may be disturbed or provoked to resentment because of it. A refusal to obey a policeman's command to move on when not to do so may endanger the public peace, may amount to disorderly conduct." (A. 155-156 [Tr. 375-376].)

Petitioners duly took exception "to the definition of disorderly conduct in that it is vague and abrogates the de-

fendants' rights as guaranteed by the First and Fourteenth Amendments, of the United States Constitution." (A. 159 [Tr. 381].)

The jury found each of the petitioners guilty by a general verdict. (A. 159-160 [Tr. 386-387].) The court sentenced each of them to the maximum allowable sentence, sixty days in the Baltimore City Jail and a fine of fifty dollars plus costs (A. 161 [Tr. 390-391]), after remarking that he could not comprehend by "what type of mental processes they decided to go to the United States Army recruiting station, deliberately counteracting the effort of the government to get men to serve their country, by doing what they did and then demonstrating. . . . I think this thing was well planned in advance, and was intended to focus as much attention as possible not only protesting the war in Viet Nam but at the efforts of the government to help continue that war as effectively and efficiently as possible. If news of these series of events were brought to the attention of the men in Viet Nam I am sure it would be bad for the morale to say the least. And they are college men, intelligent men who do things of this sort." (A. 160 [Tr. 389-390].)

Petitioners noticed a timely appeal to the Court of Appeals of Maryland, which shortly thereafter transferred the case to the newly-created Court of Special Appeals. In the Court of Special Appeals, petitioners contended, *inter alia,* (1) that the Maryland disorderly conduct statute, Md. Code Ann. Art. 27, § 123, on its face and as authoritatively construed by the Maryland courts, was unconstitutional by force of the First and Fourteenth Amendments; (2) that the same Amendments forbade the application of

the statute to punish petitioners on this record, since the record made plain that the disturbance for which they were ordered to disperse, arrested and convicted was an ideological resentment by spectators of their expressed anti-war views; and (3) that the trial court erred, under the same Amendments, in refusing their requests for instruction. On April 15, 1968, the Court of Special Appeals handed down its opinion affirming the convictions and rejecting each of these contentions on the merits. (A. 171-181.)

The same contentions were made in a petition for *certiorari* addressed to the Court of Appeals of Maryland. The Court of Appeals declined to review the case by order of November 26, 1968. A *certiorari* petition was filed in this Court on February 19, 1969 and granted on October 13, 1969 (A. 183).

B. The Demonstration at the Recruiting Center

(This section contains a general description of the events at the Army Recruiting Center, out of which petitioners' prosecutions arose. Page references to prosecution testimony are made in roman type, to defense testimony in italic type, and to the findings of the Court of Special Appeals in bold type. Factual details particularly relevant to one or another of petitioners' constitutional contentions are reserved for discussion in connection with those contentions in the Argument sections, *infra*.

If petitioners' only contentions in this Court related to the constitutionality of Art. 27, § 123 on its face and as applied to petitioners' conduct, there would be no occasion here to refer to contradicted defense testimony. We

should simply state the version of the facts as the jury might have found them most favorably to the prosecution, in the way that the Court of Special Appeals did. But petitioners also challenge the refusal of the trial court to give instructions that they requested under the First Amendment. With regard to that contention, defense evidence is obviously material. For the Court's convenience, we italicize any factual assertion in the following statement that rests upon controverted defense testimony.)

On Monday, March 28, 1966, at about 3:00 p.m., a group of demonstrators gathered outside the United States Army Recruiting Station at 3328 Greenmount Avenue, Baltimore. (A. 21, 24-25, 37, 43, 49, 79, **172-173** [Tr. 28-30, 39, 69, 84, 96, 165; **S.O. 2**].) The number of demonstrators gradually increased to thirty or forty. (A. 22, 37, 79, **172** [Tr. 30, 69, 165; **S.O. 2**].) Most of them picketed in a circle on the sidewalk in front of the Recruiting Station, carrying placards that bore slogans of protest against American involvement in the Viet Nam War. (A. 21-22, 37, 50, 79 [Tr. 30, 69, 97, 165-166]; State's Exhibits Nos. 4, 5, 6, 8.) A crowd of spectators gathered (A. 43, 50-51, 52-53 [Tr. 84, 98-99, 102]), and some of the demonstrators circulated in this crowd, distributing leaflets. (A. 47-48, 50, 52, 53 [Tr. 93, 98, 102, 104].) The demonstrators were peaceful and orderly at all times. (A. 51-53, 58, *120-121, 125, 132,* 149 [Tr. 99-102, 111-112, *264, 275, 292,* 348-349].)

Demonstrators had phoned the police to advise them in advance of the demonstration. (A. *101* [Tr. *218-219*]; see also A. 21, 37, 48 [Tr. 29-30, 68, 94-95].) Consequently, there were a number of police inside and outside the Sta-

tion (A. 28, 29, 32-33, 37, 43, 48-49 [Tr. 47, 49, 57-58, 68-69, 83-85, 96]); and the United States Marshal with several deputies was also inside (A. 23, 24-25, 28, 31-33 [Tr. 33, 39, 47, 54-55, 56-58]).

At approximately 3:30 p.m., three of the petitioners, who had been among the demonstrators on the picket line (A. 40-41 [Tr. 77-79]; State's Exhibits Nos. 4-6), left the line and entered the Recruiting Station. (A. 22, 173 [Tr. 30; S.O. 2].) They requested the sergeant in charge to place some of their posters and literature on display inside. (A. 22, 43, 81, 173 [Tr. 30, 84, *172;* S.O. 2].) He refused. (A. 22-23, 43, 173 [Tr. 31-32, 84; S.O. 2].) They said that they would remain in the station until the posters were displayed. (A. 23, 173 [Tr. 32-33; S.O. 2].) Other demonstrators were coming in and out of the Station, and the group continued to talk, discuss and argue with the sergeant. (A. 25, 41, 43 [Tr. 39, 78, 84-85]; see State's Exhibits Nos. 3, 7.) No effort was made to remove them until just before closing time. (See A. 23-24, 25 [Tr. 32-34, 39-40].) By that hour, the remaining three petitioners had also entered the Station. (A. 24, 173 [Tr. 35-36; S.O. 2].)

Shortly before the usual 5:00 p.m. closing hour, the sergeant and the United States Marshal ordered the six petitioners to leave. (A. 23-24, 25-26, 31, 37, 43-44, *82, 102, 108, 153,* 173 [Tr. 34, 40-41, 55, 69-70, 85-86, *174, 232, 233, 361;* S.O. 2].) They refused (*ibid.*), and were then forcibly ejected from the Station by the Marshal, his deputies, and deputized police. (A. 26, 29, 31-32, 37-38, 44, 173 [Tr. 42-43, 49-50, 55-56, 70, 86; S.O. 2].) The police testimony is that petitioners were "escorted" out (A. 26, 29-30, 31, 32 [Tr. 42, 49-51, 55, 57]); that they were

"sort of forced out" (A. 29 [Tr. 50]); that they were carried out bodily (A. 29, 34, 37-38, 46-47 [Tr. 50, 61-62, 70, 91]), two officers holding each of them by the arms and legs (A. 35, 76, 79 [Tr. 63, 158, 166]); and that they were "put" on the sidewalk (A. 35 [Tr. 63-64]), or "placed" on the sidewalk, or "placed down" on the sidewalk (A. 37-38, 44, 76, 78 [Tr. 70, 87, 159, 163-165]) outside. As to the position in which the petitioners landed on the sidewalk, one deputy marshal testified: "I don't recall, sir. As I recall I believe most of them were in a standing position. There might have been some that were seated but I don't recall." (A. 35 [Tr. 64]; see also A. 36 [Tr. 65-66].) Another officer testified that petitioners were "picked up and deposited outside on the sidewalk" (A. 44 [Tr. 86]; see also A. 54-56 [Tr. 104-110]); asked how the petitioners got into a sitting posture on the sidewalk, he testified that they were "deposited there by us" (A. 46-47 [Tr. 91]; see also A. 38, 44 [Tr. 72, 87]). "They were dropped; carried and dropped right out." (A. 47 [Tr. 92].) The officer could not remember how they landed, except that the last of the six (which of the petitioners, the officer also could not remember) was put down on his feet. (A. 47 [Tr. 92]; see also A. 54-55, 76, 78 [Tr. 104-107, 158-159, 163-165].) *Petitioners and defense witnesses testified consistently that petitioners were thrown forcefully onto the pavement and landed on their backs or rumps.* (A. *82-84, 90-91, 102-103, 121-122, 126, 130-131, 132, 134-135, 153* [Tr. *174-177, 191-193, 222-223, 266-267, 276, 286-287, 292, 296-297, 360*].) A prosecution rebuttal witness, the newspaper reporter Fogarty, contradicted both this defense testimony and the testimony of the police that even some of the petitioners were

placed on their feet. His version of the eviction was that the marshals and the police carried the boys out of the Station with their bodies "less than a foot" off the ground (A. 141 [Tr. 321]) and "set them down on the pavement" (A. 141 [Tr. 322]), where they landed "[o]n their rear" (*ibid.*). The Court of Special Appeals, concluded, with somewhat greater clarity than the record will allow, that: "Some [of the petitioners] . . . were carried outside and deposited in a prone position upon the sidewalk while others were escorted out." (A. 173 [S.O. 3].)

The testimonial accounts of what petitioners did after they hit the sidewalk are also in hopeless disagreement. One police officer said that two of them tried to crawl back towards the Recruiting Station (A. 38, 173 [Tr. 70; S.O. 3]); but no other witness mentioned this. For the most part, the police version is that the petitioners "lied down for about a minute and then they came to a sitting position" (A. 38 [Tr. 72]; see also 45, 70, 78 [Tr. 88, 143-144, 162-163]), and thereafter sat in a semi-circle, completely blocking the sidewalk (A. 38-39, 44-45, 55-57, 60, 69, 71, 173 [Tr. 72, 87-89, 108, 110, 111, 117, 142, 146; S.O. 3]). *Petitioners and defense witnesses claim that petitioners sat or sprawled, some on top of others, where they had been thrown; that they did not move except to try to get up; and that they were restrained from getting up by the police.* (A. *82-83, 91-94, 95, 98-99, 103-104, 106-107, 109, 111-112, 127-128, 130, 134-135* [Tr. *175-176, 194-199, 203, 211-214, 224, 230-231, 235-236, 242-243, 279-281, 286, 296-297*].) *According to the defense testimony, petitioners were not so positioned as to block the sidewalk; rather, the sidewalk was blocked on both sides by the crowd of spectators that had gathered to watch*

their ejection from the Recruiting Station. (A. 91-92, 111, 113, 129-130, 133 [Tr. *193-195, 240-241, 245-246, 283-284, 293*].)

In any event, when petitioners emerged from the Station, the picket line dispersed and a crowd of 50 to 150 people—including the 30 to 40 picketers—collected around to watch. (A. 38-39, 44, 45-46, 60-61 [Tr. 72-73, 87, 89, 118].)[8] It appears to be uncontested that this crowd was in fact blocking the sidewalk so that it would have been impossible for pedestrians to traverse the area where petitioners were placed. (A. 38-39, 45 [Tr. 72, 89]; State's Exhibits Nos. 2, 9.) Some of the spectators in the crowd expressed hostility to the anti-war protest or to the petitioners by chanting "Bomb Hanoi"; and there were a couple of shouts: "let's get them," or "Let me get to them; I'll bust him in the mouth" (A. 39, 46, 48, 58, 71, 148, 173 [Tr. 73, 89-90, 94, 114, 146, 325-326; S.O. 3]). Petitioners responded by singing *"We shall overcome."* (A. 45, 60, 62, *84, 93-94, 104-105* [Tr. 88, 117, 121, *179, 198, 226*].) Police surrounding the petitioners felt the crowd pressing forward, "pushing in" (A. 55 [Tr. 107]; see also A. 39, 45, 56, 60, 71, 150 [Tr. 73, 89, 109, 117, 146, 351-352]), but no one charged or attempted to assault the petitioners (A. *84, 97-98, 104-105,* 150 [Tr. *178, 209, 226-227,* 351]).[9] Although demonstrators still holding

[8] The Court of Special Appeals found that there were "between 80 and 100 onlookers" at this time and that the crowd later grew larger. (A. 173 [S.O. 3].) The record will support the conclusion that eventually as many as 150 persons gathered outside the Recruiting Station watching the petitioners. But each of these estimates includes 30 or 40 anti-war demonstrators and pickets. (A. 60-61) [Tr. 118].)

[9] The Court of Special Appeals concluded that "the police found it necessary to hold the crowd back and to intercede between the two elements. . . . The resultant turmoil was such that the police

their anti-war placards were mingled with the "hostile" spectators in the crowd (A. 55, 56, 59-60, 64, *93, 103, 117-119, 123, 127, 130, 133* [Tr. 107-108, 110, 116, 117-118, 127, *198, 223-224, 256-262, 269-270, 279, 284, 294*]), there were no fights or attempts to attack these demonstrators; nor were there even any threats made against them (A. 61, *114, 118, 119, 123, 126, 127, 133* [Tr. 120, *250, 259, 261, 270, 276-277, 279, 294*]).

Petitioners and defense witnesses testified that the crowd was curious but at all times peaceful and controlled. (A. *84, 105, 114, 123, 126, 138* [Tr. *178, 227, 259, 270, 276-277, 303-304*]; see also State's witness Fogarty, at A. 143, 150 [Tr. 326, 351-352].) *Neither the petitioners nor the other demonstrators who testified below felt that their safety was threatened by the crowd.* (A. *97-98, 105, 114, 123, 126, 127, 137-138* [Tr. *209-210, 227, 249-250, 259, 270, 276-277, 279, 302-304*].) It is uncontested that there was adequate police protection at all times by considerably more than twelve police officers (A. 32-33, 37, 46,

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found it necessary to fend off the crowd's attempt to vent its displeasure on the demonstrators and to ward off the trampling of the appellants." (A. 173 [S.O. 3].) The record supports these statements as an accurate view of what the police "found"—that is, what the police thought—(A. 44, 45, 46-47, 56, 61, 65 [Tr. 87, 89, 90-93, 109, 119, 129]) but not as an accurate description of what actually happened in front of the Recruiting Station. What actually happened was: (1) no aggressive behavior whatever by any petitioner or demonstrator toward any of the "hostile" spectators; (2) no attempt by any "hostile" spectator to attack any of the demonstrators scattered through the "hostile" crowd; (3) two verbal threats toward petitioners described in text, *supra;* (4) a pushing forward of the crowd, which may have been occasioned either by "hostility" or by the curiosity of those in the rear (see A. 150 [Tr. 351-352]); and (5) no attempt by anyone to charge or physically molest the petitioners, other than this general movement of the crowd. See text *supra* and immediately *infra*.

48-49, 50, 63-64, 66, 68, 74-75, *136* [Tr. 57-58, 69, 90-91, 94-95, 97, 125-126, 131, 139, 154-155, *299*]); and that more officers could have been obtained if they had been needed (A. 66 [Tr. 131]).

However, the police concluded that the crowd was hostile to the protest and to petitioners (A. 39, 47-48, 56, 61, 62-63, 64-65, 73 [Tr. 72-73, 93-94, 109-110, 118-119, 123, 128-130, 152]), and decided to arrest petitioners in order to protect them from getting hurt (A. 46, 59, 60, 61, 65 [Tr. 90, 115, 117, 119, 129]). One officer testified that he first attempted to disperse the crowd "many a time" (A. 51, 65 [Tr. 100, 130-131]), but *six defense witnesses and* a reporter called by the prosecution testified that the crowd was not asked to disperse (A. *113, 118, 119, 122, 126, 132-133,* 149-150 [Tr. *245, 257, 261, 268-269, 277, 293,* 351]).

According to the police testimony, the officers several times ordered petitioners to leave the sidewalk and they failed to respond. (A. 38, 45, 47-48, 55, 56-57, 58-59, 62, 67, 69, 70-71, 72-74 [Tr. 72, 88, 92-94, 107, 109-111, 113-115, 121-122, 135, 141-142, 145, 149-152].) The Court of Special Appeals found that the police repeated this order three times. (A. **173** [**S.O. 3**].) *Defense witnesses testified that no such order was given* (A. *83, 94-95, 96-97, 104, 109, 115, 122, 126-127, 132, 136-137* [Tr. *176-177, 198, 202-203, 206-207, 225-226, 235-236, 250-251, 268, 277, 293, 300-301*]), *and that petitioners were in some cases restrained by officers from getting up off the sidewalk* (A. *83, 92-93, 95, 98-99, 103-104, 106-107, 109, 112, 128, 134-135* [Tr. *176, 195-197, 203, 211-213, 224, 230-231, 236, 242-243, 281, 296-297*]). After petitioners had been on the pave-

ment for a total period estimated as fifteen or twenty minutes by a prosecution witness (A. 142, 149 [Tr. 323, 347-348]), *and as no more than five minutes by defense witnesses* (A. *84, 96, 106, 124, 153* [Tr. *179, 204-205, 230, 272, 360*]), petitioners were arrested and charged with disorderly conduct (A. 45, 55, 59, 66-67, 69-70, 74 [Tr. 88-89, 107, 114-115, 135, 142-143, 154]).

Summary of Argument

I.

The narrow question presented here is whether petitioners' convictions of the particular offense of disorderly conduct defined by Maryland law can stand, on this record, consistently with the First Amendment. As submitted to the jury below, disorderly conduct is *either* "doing or saying or both of that which offends, disturbs, incites or tends to incite a number of people gathered" in an area, *or* refusing to obey a police order to move along "when not to do so may endanger the public peace." If either of these definitions is constitutionally impermissible, petitioners' convictions must be reversed.

II.

Both definitions are unconstitutionally vague and overbroad under the "strict" standards of definiteness required by this Court's decisions of legislation that may overreach First Amendment freedoms. The disturbing-the-public definition falls squarely within the condemnation of a long line of cases from *Cantwell* v. *Connecticut* to *Cox* v. *Louisiana*. The police-order definition is plainly ruled uncon-

stitutional by *Cox* and by *Shuttlesworth* v. *City of Birmingham*, 382 U.S. 87 (1965).

Each definition presents an extreme instance of the several vices that attend sweeping penal legislation intruded into the First Amendment area. Each fails to give fair notice of what is prohibited by it. Each delegates arbitrary and censorial power to the police and to juries. Each thereby permits criminal liability to be imposed on the basis of nothing more than the expression of unpopular ideas. Consequently, each operates broadly to deter constitutionally protected free speech. Both definitions, and the statute construed to embody them, are facially unconstitutional.

III.

Under these definitions, petitioners have been convicted of disturbing the public, or of disobeying a police order under circumstances likely to disturb the public. But the record is plain that the only "disturbance" occasioned by the petitioners was the angry and resentful response of a crowd of spectators who disagreed with petitioners' views concerning the Viet Nam War. Any conviction for creating this kind of disturbance plainly flouts the First Amendment.

Neither the police order which petitioners allegedly disobeyed nor their convictions can be constitutionally sustained on the theory of incipient violence on the part of the spectators. This is so both because violent opposition to an idea will not warrant suppression of the idea and because, on this record, the threat of violence was factually insubstantial. As applied to these petitioners, Mary-

land's disorderly conduct law has become the instrument of punishment of ideological unpopularity and nothing more. So applied, it is unconstitutional.

IV.

Whether or not the record *compels* the conclusion that the "disturbance" created by petitioners was ideological, it plainly *permits* that conclusion. The jury might have found no "disturbance" other than resentment of petitioners' anti-war views by spectators. The trial court's charge allowed conviction if petitioners disturbed, offended or incited the spectators; and the charge did not define those terms. It was obvious constitutional error, under these circumstances, to refuse requested instructions tendered by the defense that would have told the jury it could not convict petitioners for nothing more than making spectators angry by the expression of their anti-war views.

For the same reason, it was constitutional error to refuse requested defense instructions that would have limited criminal disobedience of a police order to disobedience of a "reasonable and lawful" police order, and would have given the jury appropriate constitutional standards for the determinations of reasonableness and lawfulness. Without the qualifications contained in the requested and refused instructions, the theories of disorderly-conduct liability submitted to the jury permitted conviction on overbroad and sweeping grounds forbidden by the First Amendment.

ARGUMENT

I.

Introduction

In the context of this Court's First Amendment decisions, the issues raised here are vital but very narrow. Each of the three questions presented relates to petitioners' convictions of the particular crime of disorderly conduct defined by a particular Maryland statute, on the record of a trial of the factual controversies framed by the terms of that statute. No question is presented as to whether Maryland might constitutionally punish these petitioners for some differently defined offense after some differently conducted trial.

We make this point at the outset for the obvious reason that petitioners' conduct may seem blameworthy to the Court. Petitioners appear to have conducted a sit-in in an Army Recruiting Center, and they may also have conducted a sit-down on a Baltimore sidewalk. We say "appear" and "may" with no purpose to be cute or evasive. Exactly what occurred inside the recruiting office was never tried in an adversary fashion below, since it lay outside the scope of the charge against petitioners.[10] And whether petitioners

[10] Petitioners were not charged with any offense on the basis of their conduct within the Recruiting Center. The statute on which the prosecution was based, MD. CODE ANN., Art. 27, § 123, defines disorderly conduct in a manner that has no flavor of criminal trespass. Moreover, Art. 27, § 123 is limited by its terms to disorderly conduct "upon any public street or highway" or in other enumerated places none of which includes by any stretch of the imagination a United States Army Recruiting Station. Compare MD. CODE ANN., Art. 27 §§ 122, 124 (1967 Repl. Vol.).

[footnote 10 cont'd on next page]

did or did not wilfully sit or stay seated on the sidewalk was the subject of intense factual dispute at their trial—a dispute that petitioners' jurors never resolved because it was not submitted to them as decisive of the issue of petitioners' guilt under the disorderly conduct charge.[11]

On the present record, therefore, it is not surprising that no disorderly conduct within the recruiting center was alleged or proved. Neither the police nor the United States Marshal arrested the petitioners for their conduct within the Center. One of the arresting officers testified that he had no jurisdiction inside the Center (A. 43 [Tr. 85]); and no officer suggested that events in the Center prompted petitioners' arrest and charge. To the contrary, all police testimony is to the effect that the decision to arrest petitioners was based entirely upon their conduct, and the conduct of the spectators, after their ejection from the Center. (See A. 59, 60, 61, 65 [Tr. 115, 117, 119, 129].) At the conclusion of the testimony, the trial court declared that the offense of "disorderly conduct, with which they are charged does not relate to anything that took place inside of the office." (A. 154 [Tr. 362-363].)

Accordingly, defense counsel had little concern at trial for events that occurred inside the Recruiting Center. The prosecution's principal witness concerning those events was the sergeant in charge of the installation. (See A. 20-24 [Tr. 26-36].) He was not cross-examined by the defense. Defense examination of other witnesses regarding occurrences within the center was limited to showing that petitioners were seized and thrown out bodily in a manner that explained their prone positions on the sidewalk outside and thereby negatived the notion of a willful sit-down.

[11] Petitioners were not charged with obstructing a sidewalk. It is dubious whether any Maryland statute makes such obstruction an offense. *Cf.* MD. CODE ANN., Art. 27, § 121 (1967 Repl. Vol.), dealing with the obstruction of free passage along a street or highway or in the area of a railroad station. In any event, obstruction of the sidewalk was not charged here; and, although the issue was the subject of conflicting evidence at trial, it was not submitted for the jury's resolution. Indeed, no particular conduct of petitioners with regard to sitting on the sidewalk was made a question for the jury under the court's instructions. The jurors might have credited petitioners' testimony that they were thrown involuntarily onto the sidewalk and restrained there by the police, and yet convicted them for the "doing or saying or both of that which offends, disturbs, incites or tends to incite a number of people gathered in the same area." (A. 155 [Tr. 375-376].)

These considerations underline the solid procedural reason why this Court has many times reversed criminal convictions upon charges found to be constitutionally impermissible, even though the facts of record might have supported a jury verdict convicting the defendants of some other, constitutionally allowable offense. *E.g., Edwards* v. *South Carolina,* 372 U.S. 229, 236 n. 11 (1963); *Shuttlesworth* v. *City of Birmingham,* 382 U.S. 87, 91-92 (1965); *Gregory* v. *City of Chicago,* 394 U.S. 111, 112 (1969); *Street* v. *New York,* 394 U.S. 576, 580-581 (1969). In *Garner* v. *Louisiana,* 368 U.S. 157 (1961), the Court set aside breach-of-the-peace convictions and declined to consider whether the record would have supported charges of trespass, saying: "[W]e cannot be concerned with whether the evidence proves the commission of some other crime, for it is . . . a denial of due process to send an accused to prison following conviction for a charge that was never made." (*Id.,* at 164.) And see *De Jonge* v. *Oregon,* 299 U.S. 353, 362 (1937). This is elemental, since "notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." *Cole* v. *Arkansas,* 333 U.S. 196, 201 (1948).

But there is an equally fundamental substantive reason that also dictates this method of adjudication in First Amendment controversies, and particularly in demonstration cases. Demonstrations classically involve activity that has both "speech" and "nonspeech" components. "This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First

Amendment freedoms. . . ." *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968). See *Cameron* v. *Johnson*, 390 U.S. 611, 617 (1968); *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308, 313-314 (1968). But those limitations are permitted only where a government, by its legislation, does in fact assert its justifying interest in the regulation of the nonspeech component, see *Cox* v. *Louisiana*, 379 U.S. 536 (1965); *Gregory* v. *City of Chicago*, 394 U.S. 111, 117-121 (1969) (opinion of Mr. Justice Black); where the application of the legislation is made to depend upon legal elements and factual issues relevant to that interest, see *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308, 314-315 (1968); and where "the alleged governmental interest in regulating conduct [does not arise] . . . because the communication allegedly integral to the conduct is itself thought to be harmful" and therefore sought to be regulated. *United States* v. *O'Brien*, 391 U.S. 367, 382 (1968). We have no doubt, for example, that a State could constitutionally forbid the distribution of leaflets by a man with a communicable disease. But that would not permit conviction even of a smallpox carrier under a statute making it a crime to disseminate seditious writings.

This concept is absolutely indispensable to the proper accommodation of legitimate government regulation of conduct with the freedom of speech that the First Amendment guarantees. It has been recognized most conspicuously, perhaps, in licensing cases. There, the law is clear that a State may constitutionally require a license for a parade, in order to serve the legitimate state concern of traffic control. *Cox* v. *New Hampshire*, 312 U.S. 569 (1941). But it is equally clear that the standards for issuance of a license

must in fact relate to traffic-control concerns; and that under guise of traffic control a State may not confer upon the permit issuer a power to censor the ideology of paraders. *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147 (1969). The same principle emerges in criminal cases not involving licensing. A State may constitutionally prohibit the obstruction of its sidewalks, even by placard-bearing demonstrators, *cf. Cameron* v. *Johnson*, 390 U.S. 611 (1968); but it may not cast the prohibition in terms which —because insufficiently focused on obstruction—serve as instruments of ideological control. *Cox* v. *Louisiana*, 379 U.S. 536 (1965).

Preservation of that principle requires close scrutiny by the Court to assure that any state criminal statute, charge or conviction which may overreach activity protected by the First Amendment actually stands on grounds consistent with the Amendment. If it does not—if it has impermissibly seized upon incidents of speech or conduct protected by the Amendment—it must be set aside even though other incidents of the same speech or conduct might constitutionally have been made the basis of state regulation and punishment. Precisely that sort of scrutiny is demanded in the present case. And we should be clear that, in saying so, we need not rely in any part upon the assumption that a sit-in in a recruiting center or a sit-down on a sidewalk would be "labeled 'speech' " for First Amendment purposes. See *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968). For, as petitioners' case went to the jury, there was other evidence of unquestionable "speech"—petitioners' marching in the picket line with placards; petitioners' singing "We shall overcome," for example—upon which conviction might have been based in part. See *Street* v. *New York*, 394 U.S. 576 (1969).

So we think that the issues here are *not* whether petitioners could constitutionally have been convicted for refusing to leave the Recruiting Station on request, *cf. Adderley* v. *Florida,* 385 U.S. 39 (1966), or for obstructing the sidewalk outside, *cf. Cameron* v. *Johnson, supra.* Petitioners were not charged with any such offenses; their trial was not upon issues raised by any such offenses; and the elements of no such offenses were submitted to the jury. See *Gregory* v. *City of Chicago,* 394 U.S. 111, 112 (1969). The charge against them, the issues framed for trial, and the submission to the jury were all concerned exclusively with the offense of disorderly conduct, defined disjunctively as "the doing or saying or both of that which offends, disturbs, incites or tends to incite a number of people gathered in the same area," or refusing "to obey a policeman's command to move on when not to do so may endanger the public peace." (A. 155-156 [Tr. 375-376].) The questions here are whether *that* charge is constitutional: on its face, as applied to petitioners, and as administered through the jury instructions given at their trial.

One other introductory point is required by the disjunctive character, just mentioned, of the offense of disorderly conduct under Md. Code Ann., Art. 27, § 123, as authoritatively construed by the Maryland courts and submitted to petitioners' jury. Under the trial court's instructions, both theories of disorderly conduct were submitted as independently sufficient bases of conviction. (A. 155-156 [Tr. 375-376].) The jury verdict was the general one of "guilty." Therefore, under settled principles, petitioners' convictions must be reversed if *either* theory was constitutionally impermissible. *Williams* v. *North Carolina,* 317 U.S. 287 (1942); *Stromberg* v. *California,* 283 U.S. 359

(1931); *Thomas* v. *Collins*, 323 U.S. 516 (1945); *Street* v. *New York*, 394 U.S. 576 (1969); *cf. Gregory* v. *City of Chicago*, 394 U.S. 111 (1969); *Shuttlesworth* v. *City of Birmingham*, 382 U.S. 87 (1965).

II.

Article 27, § 123 Is Unconstitutional on Its Face by Force of the First and Fourteenth Amendments.

The operative portion of Art. 27, § 123 charged to the jury below as the measure of petitioners' guilt punishes "Every person who shall be found . . . acting in a disorderly manner to the disturbance of the public peace, upon any public street or highway . . . ." (A. 155 [Tr. 375]; see p. 11, *supra*.) As indicated by the Court of Special Appeals below (A. 175-177), authoritative Maryland constructions of this language announce two distinct theories of disorderly-conduct liability. The first, expounded in *Drews* v. *State*, 224 Md. 186, 188, 167 A.2d 341, 343-344 (1961),[12] was submitted to petitioners' jury as follows:

> ". . . disorderly conduct is the doing or saying or both of that which offends, disturbs, incites or tends to incite a number of people gathered in the same area. It is conduct of such nature as to affect the peace and quiet of persons who may witness it and who may be disturbed or provoked to resentment because of it." (A. 155 [Tr. 375-376].)

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[12] *Remanded on other grounds*, 378 U.S. 547 (1964), *aff'd on remand*, 236 Md. 349, 204 A.2d 64 (1964). The *Drews* case arose under an earlier version of Art. 27, § 123, having language virtually identical to that of the section as it was in force at the time of the offense charged against petitioners.

This we shall call the disturbing-the-public theory.

The second theory, or disobeying-a-police-order theory, derives from *Drews, supra;* from *Sharpe* v. *State,* 231 Md. 401, 404, 190 A.2d 628, 630 (1963); and from *Harris* v. *State,* 237 Md. 299, 303, 206 A.2d 254, 256 (1965). As charged below it is that:

> ". . . A refusal to obey a policeman's command to move on when not to do so may endanger the public peace, may amount to disorderly conduct." (A. 155-156 [Tr. 376].)[13]

Apart from a reading of the statute, these two passages constituted the only definition of disorderly conduct given to petitioners' jury. The Court of Special Appeals approved the passages without further elaboration or explanation (A. 175-178 [S.O. 5-6]), and so they continue to provide the entire definition of disorderly conduct under Art. 27, § 123. We submit that each passage, and the theory of criminal liability that each embodies, is unconstitutional.

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[13] The formulation in the *Harris* opinion is considerably narrower than this one, which the trial court took from *Drews.* In *Harris,* the Court of Appeals said that: "A failure to obey a *reasonable and lawful* request by a police officer *fairly made* to prevent a disturbance to the public peace constitutes disorderly conduct." (Emphasis added.) Petitioners would have no quarrel with the constitutionality of the *Harris* formula. Indeed, it was the theory of petitioners' requested instructions (pp. 6-7, *supra*), which the court below refused to give.

A. The Prohibition of Doing or Saying That Which Offends or Disturbs Other People Fails to Give Fair Warning of What Is Prohibited, Delegates Censorial Discretion to the Police and the Jury, Has an Overbroad Deterrent Effect on Protected Free Expression, and Allows the Imposition of Criminal Liability Solely on the Basis of Public Disagreement With Expressed Ideas.

Maryland's disturbing-the-public theory of disorderly conduct exhibits in extreme measure every vice that has ever caused this Court to strike down penal legislation as vague or overbroad:

1. "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process. . . ." *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926).[14] Art. 27, § 123, as construed to prohibit "the doing or saying or both of that which offends, disturbs, incites, or tends to incite, a number of people gathered in the same area" and "affects the peace and

[14] In *Connally*, this Court voided a penal statute requiring that state contractors pay their laborers "not less than the current rate of per diem wages in the locality where the work is performed." The Court held that this reference of criminal liability to an ill-defined standard of public usage rendered the law impermissibly vague. Art. 27, § 123, of course, refers liability to a still more ill-defined standard of public *taste*. Moreover, it is significant that the *Connally* statute dealt with a limited class of people (state contractors) dealing in a limited and specified sort of activity (hiring workers), whereas the present statute applies to everyone and potentially to all public activity, including conduct protected by the First Amendment. *Cf. Boyce Motor Lines Inc.* v. *United States*, 342 U.S. 337 (1952).

quiet of persons who may be disturbed and provoked to resentment because of it," is such a statute.

This kind of prohibition "involves calculations as to the boiling point of a particular person or a particular group, not an appraisal of [the actor's conduct or] . . . comments *per se.*" *Ashton* v. *Kentucky*, 384 U.S. 195, 200 (1966). What will cause "offense," "disturbance," or "resentment" on the part of persons in an area is incalculably variable. Actions and expressions that some will find admirable, interesting, or at least innocuous will upset, bother, or irritate others. Some will be offended or disturbed by anti-war demonstrations; some by anti-anti-war demonstrations; some by any demonstrations at all; some by college students demonstrating, or by college students *simpliciter*, or by college students singing "We shall overcome"; some by anyone singing "We shall overcome," or by anyone singing on the sidewalk, or by anyone sitting on the sidewalk singing, or by only anti-war demonstrators sitting on the sidewalk singing. The list and the possible permutations of all potential public peeves are imponderable. Yet Art. 27, § 123 defines the offense of disorderly conduct entirely in terms of public irritation or irritability. An actor is required to predict the emotional reception of the public to his acts. If he guesses wrong and gets an unsympathetic response where a sympathetic one was hoped for, he is criminally liable.

The emotional reaction of the public is both necessary and sufficient to make out the offense. Placing a delivery cart athwart the sidewalk might or might not do it, depending upon the patience of the passers-by. If a demonstrator's body is placed on the same sidewalk, liability turns on the ideology of the spectators. Had the Green-

mount Avenue crowd attracted by petitioners' demonstration been doves instead of hawks—or, perhaps, had there been more doves and fewer hawks—petitioners would not have been guilty of disorderly conduct. Surely, no one may thus "be required at peril of . . . liberty . . . to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Lanzetta* v. *New Jersey,* 306 U.S. 451, 453 (1939).[18]

2. It will be objected that this description of the statute's force is exaggerated and far-fetched. And so perhaps it is, as a matter of daily operation. Not all public peeves, by any means, are likely to be summarily arrested and brought to book. But this is so simply because Art. 27, § 123 neither is nor can be uniformly enforced according to its terms.

Selective enforcement saves the statute from absurdity, but makes it no less constitutionally objectionable. To the contrary, it is a matter of independent constitutional concern that the vagueness of the statute, as construed, permits and requires the police to make their own arbi-

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[18] The *Lanzetta* case involved a statute that punished persons having a criminal record and not engaged in any lawful occupation who were known to be members of a "gang" of two or more persons. The State argued that such dragnet legislation was necessary for effective crime control, in view of the variousness of "gang" activities that threaten harm. This is not unlike the argument frequently put forward in support of vague disorderly conduct laws, which must be general, we are told, because of the variousness of ways in which persons may disturb others. While it is undisputed that maintaining order in the public streets, like crime control, is a legitimate legislative purpose, *Lanzetta* makes plain that no argument of necessity can justify a penal statute which fails to inform people in reasonably clear terms what is being prohibited.

trary and censorial judgment the sole basis of arrest. Under the Fourteenth Amendment, "lawmaking is not entrusted to the moment-to-moment judgment of the policeman on his beat." *Gregory* v. *City of Chicago*, 394 U.S. 111, 120 (1969) (opinion of Mr. Justice Black). See *Shuttlesworth* v. *City of Birmingham*, 382 U.S. 87 (1965); *Cox* v. *Louisiana*, 379 U.S. 536 (1965). Yet, by broadly prohibiting all actions which offend or disturb the public, Art. 27, § 123 inevitably gives the policeman a power and responsibility to determine whether sufficient numbers of persons in an area have been disturbed, whether their disturbance is warranted and proper, and, presumably, whether it is trivial or substantial.

We do not mean to suggest that the statute on its face calls for these judgments. But to conceive of its administration without them is other-worldly. Judgments of this kind are made hourly and must be made hourly if half the population is not to be jailed for disturbing, offending, or provoking the resentment of the other half.[16] Such is the ineluctable consequence of the statute at its best; while at its worst it is "susceptible of sweeping and improper application," *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 433 (1963), furnishing a convenient tool for "harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure," *Thornhill* v. *Alabama*, 310 U.S. 88, 97-98 (1940).

3. The constitutional concern that police discretion be confined by statutes having some reasonable degree of specificity is especially compelling when that discretion may overreach activity that is protected by the First

[16] *Cf. Territory of Hawaii* v. *Anduha*, 48 F.2d 171 (9th Cir. 1931).

Amendment. *E.g., Hague* v. *C.I.O.*, 307 U.S. 496 (1939); *Kunz* v. *New York*, 340 U.S. 290 (1951); *Niemotko* v. *Maryland*, 340 U.S. 268 (1951). The constitutional vice of delegating broad discretion to the police in First Amendment areas was the ground of decision in *Cox* v. *Louisiana*, 379 U.S. 536 (1965). There a statute prohibiting the obstruction of "the free, convenient and normal" use of any sidewalk or street was, like Art. 27, § 123, plainly too broad for uniform enforcement. It was selectively administered and according struck down:

> "[T]he lodging of such broad discretion in a public official allows him to determine which expressions of view will be permitted and which will not. This thus sanctions a device for the suppression of the communication of ideas and permits the official to act as a censor . . . It is clearly unconstitutional to enable a public official to determine which expression of view will be permitted and which will not or to engage in invidious discrimination among persons or groups either by use of a statute providing a system of broad discretionary licensing power or, as in this case, the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute." (*Id.*, at 557-558.)

4. A delegation of this kind of sweeping authority to the police is additionally pernicious when a statute is cast in terms of public reaction. In a situation involving a confrontation of groups of people expressing divergent points of view, such a statute calls the police to the aid of those who are most quick to anger and most easily "disturbed," "offended" or "provoked to resentment." Thus the statute

authorizes precisely what the Constitution condemns: the subordination of constitutional rights of free expression to the intolerance and hostility of those who find the expression offensive. In the plainest terms, the police are encouraged to arrest the demonstrator on the basis of the heckler's reaction. But see *Wright* v. *Georgia,* 373 U.S. 284, 292-293 (1963); *Watson* v. *City of Memphis,* 373 U.S. 526 (1963); *Edwards* v. *South Carolina,* 372 U.S. 229 (1963); *Terminiello* v. *City of Chicago,* 337 U.S. 1 (1949).

5. Art. 27, § 123 is additionally infirm because it allows the jury to create its own standard of guilt and to convict the proponents of unpopular ideas simply because the jury finds those ideas provoking or distasteful. Even in matters where sensitive First Amendment rights are not threatened, the Due Process Clause protects a criminal defendant against such vagaries. *Giaccio* v. *Pennsylvania,* 382 U.S. 399 (1966). The allowable scope of jury discretion in the First Amendment area is, of course, far narrower. It was for this reason that the Court, in *Herndon* v. *Lowry,* 301 U.S. 242 (1937), reversed the conviction of a Communist Party organizer under an insurrection statute. The statute, as construed, allowed conviction if the jury believed that the defendant intended an insurrection to happen at any time within which he might reasonably expect his influence to be directly operative. This Court struck down the statute on the ground that it "licenses the jury to create its own standard in each case. . . . No reasonably ascertainable standard of guilt is prescribed. So vague and indeterminate are the boundaries thus set to the freedom of speech and assembly that the law necessarily violates the guarantees of liberty embodied in the Fourteenth Amendment." (*Id.,* at 263-264.)

Under Art. 27, § 123, the license given the jury is far greater than that condemned in *Herndon*. The jurors are required to find only that some persons have been disturbed or offended by a defendant's conduct or opinions. In petitioners' case no limitation was placed upon this theory of liability; and the trial court refused to give instructions proposed by the defense which would have informed the jury that it could not convict merely because some spectators disagreed with the ideas that petitioners expressed.

6. In arguing that Art. 27, § 123 is unconstitutional because it fails to give fair warning of what is prohibited and because it delegates unfettered discretion to law enforcement officers and to juries, we have adverted to the free speech guarantees of the First Amendment. This Court's decisions firmly establish, we believe, that uniquely stringent standards of specificity and precision are demanded of legislation that potentially overreaches federal freedoms of expression. *E.g., Brandenburg* v. *Ohio*, 395 U.S. 444 (1969); *Ashton* v. *Kentucky*, 384 U.S. 195 (1966), and authorities cited; *United States* v. *National Dairy Prods. Corp.*, 372 U.S. 29, 36 (1963). The reasons are several.

First, the unclarity of the line of constitutional protection itself occasions a further lack of fair warning in a due process sense. An actor is required to speculate concerning the extent to which the protection of the First Amendment will prohibit a conviction under the statute. See *Garner* v. *Louisiana*, 368 U.S. 157, 185, 207 (1961) (Mr. Justice Harlan, concurring).

Second, the discretion allowed law enforcement officers and juries by vague and overbroad statutes in this area has the effect of inaugurating precisely such a regime of censorship—of licensing speech depending upon approval of its content—as the English had experienced and the First Amendment was intended to forbid forever in this country. See *Marcus* v. *Search Warrant,* 367 U.S. 717 (1961).

Third, and most important, there is the ever-present danger that persons will refrain from protected expression rather than run the risk of incurring criminal liability under a wide-sweeping penal enactment. The First Amendment condemns statutes which are so vague that the uncertainty of the scope of their application may deter the exercise of protected speech, expression, petition or assembly. *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965).

> "[S]tandards of permissible statutory vagueness are strict in the area of free expression. . . . The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchannelled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. . . . These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." (*N.A.A.C.P.* v. *Button,* 371 U.S. 415, 432-433 (1963).)

A severe deterrent effect on the expression of unpopular views is inevitable when a statute, like Art. 27, § 123, casts an offense in vague terms of public reaction rather than in terms of any specified or ascertainable actions. If words or conduct disturb or incite, the offense is complete. But as Mr. Justice Holmes said in *Gitlow* v. *New York*, 268 U.S. 652, 673 (1925), "Every idea is an incitement"; and a major function of the First Amendment is to assure the protection of the expression of ideas which may offend, disturb or incite those people to whom they are communicated. In a real sense the need and the value of the First Amendment is greatest when the ideas expressed are most likely to offend or disturb; and for this reason, the Court has invariably found that statutes which define a crime in terms of public reaction to an idea are unconstitutional on their face.

The issue was raised in *Terminiello* v. *City of Chicago*, 337 U.S. 1 (1949) where the Court struck down a definition of breach of the peace that is strikingly similar to the instruction given the jury in the present case. In *Terminiello*, the jury was charged that breach of the peace included speech that "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance." But said the Court:

> "[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why

freedom of speech, though not absolute, . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. . . . There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas by legislatures, courts, or dominant political or community groups." (337 U.S., at 4-5.)

Art. 27, § 123, as construed, flouts the constitutional rule of *Terminiello*. A prohibition of words or actions which may offend, disturb, incite or provoke to resentment is quite as broad as a prohibition of speech which stirs the public to anger, invites dispute, brings about a condition of unrest or creates a disturbance. *Edwards* v. *South Carolina*, 372 U.S. 229 (1963), struck down a similar breach-of-the-peace conception because "The Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views . . . [and a] 'conviction resting on any of those grounds may not stand.'" (*Id.*, at 237-238.)

In *Cox* v. *Louisiana*, 379 U.S. 536 (1965), the offense of breach of the peace was defined as "to agitate, to arouse from a state of repose, to molest, to interrupt, to hinder, to disquiet." (*Id.*, at 551.) The Court held that this definition "would allow persons to be punished merely for peacefully expressing unpopular views. . . . Therefore, as in *Terminiello* and *Edwards* the conviction . . . must be reversed as the statute is unconstitutional in that it sweeps within its broad scope activities that are constitutionally protected free speech and assembly. Maintenance of the op-

portunity for free political discussion is a basic tenet of our constitutional democracy." (*Id.*, at 551-552.) So the Court has held again and again. Indeed, no breach-of-the-peace construct, however worded, has survived this Court's scrutiny as applied to conduct within the wide ambit of expression. In addition to *Terminiello*, *Edwards* and *Cox*, see *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940); *Fields* v. *South Carolina*, 375 U.S. 44 (1963); *Henry* v. *City of Rock Hill*, 376 U.S. 776 (1964); *cf. Niemotko* v. *Maryland*, 340 U.S. 268 (1951).[17] "These decisions recognize that to make an offense of conduct which is 'calculated to create disturbances of the peace' leaves wide open the standard of responsibility. . . . This kind of criminal [statute] . . . 'makes a man criminal simply because his neighbors have no self-control and cannot refrain from violence.' Chafee, Free Speech in the United States 151 (1954)." *Ashton* v. *Kentucky*, 384 U.S. 195, 200-201 (1966).

The cited decisions unavoidably condemn Art. 27, § 123. We submit it is facially unconstitutional.

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[17] In *Feiner* v. *New York*, 340 U.S. 315 (1951), the constitutionality of the New York statute on its face was not challenged. Similarly, in the "fighting words" case, *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942), the only issue brought to the Court was whether Chaplinsky's particular utterance was constitutionally protected—as, of course, it was not.

B. The Prohibition of Failing to Obey the Order of an Officer When Not to Do So May Endanger the Public Peace, Gives the Police Overly Broad Decision-Making Powers, Allows Them to Censor the Expression of Opinions on the Public Streets, and Fails to Require the Police to Protect Speakers Exercising First Amendment Rights From Hostile Public Reaction.

1. The second head of the trial court's submission to the jury is as constitutionally deficient as the first. This theory—permitting conviction for "refusal to obey a policeman's command to move on when not to do so may endanger the public peace" (A. 155-156 [Tr. 376])—is virtually identical to the formulation struck down in *Cox* v. *Louisiana*, 379 U.S. 536, 551 (1965):

> "... The statute at issue in this case, as authoritatively interpreted by the Louisiana Supreme Court, is unconstitutionally vague in its overly broad scope. The statutory crime consists of two elements: (1) congregating with others 'with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned,' and (2) a refusal to move on after having been ordered to do so by a law enforcement officer. While the second part of this offense is narrow and specific, the first element is not."

2. While this is enough to condemn the police-order theory, it is not all that is wrong with it. Petitioners requested instructions which would have told the jury, *first*, that liability could be imposed only for disobedience of a "reasonable and lawful" police order; *second*, that a police order to move on is reasonable and lawful only "if it is

made to prevent an imminent public disturbance, and if it is reasonably necessary in order to prevent such a disturbance," and, *third*, that "disturbance" means "physical violence, or the attempt to use physical violence," and not merely "an episode of shouting or singing or name-calling not calculated to spill over into imminent violence." (See pp. 6-7, *supra*.) All of these requests were refused; so, as the case went to the jury, the failure to obey *any* police order to move along was a crime, if only that failure might endanger the undefined "public peace." This

> "... part of [the statute] ... says that a person may stand on a public sidewalk in [Maryland] ... only at the whim of any police officer. ... The constitutional vice of so broad a provision needs no demonstration. It 'does not provide for government by clearly defined laws, but rather for government by moment-to-moment opinions of a policeman on his beat.' ... Instinct with its ever-present potential for arbitrarily suppressing First Amendment liberties, that kind of law bears the hallmark of a police state." (*Shuttlesworth* v. *City of Birmingham*, 382 U.S. 87, 90-91 (1965).)

The *Shuttlesworth* case itself did not, on its facts, involve the exercise of First Amendment freedoms. It was decided on the fundamental ground that a State simply may not constitutionally give policemen arbitrary power to order citizens about the streets. The Fourteenth Amendment protects the general right of citizens to use the public streets unmolested by harassing and unjustified police actions and orders, and the First Amendment protects the more specific right of citizens to use the streets as a forum for the expression of ideas and opinions. "... Wherever the title of

streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens." [22]

It is not disputed that the State has a right and responsibility to regulate use of city streets and other facilities to assure the safety and convenience of the people. This responsibility may be exercised through specific prohibitory laws, such as traffic regulations, or through delegation of limited licensing discretion to administrative officials, "under properly drawn statutes or ordinances, concerning the time, place, duration, or manner of use of the streets for public assemblies." *Cox* v. *Louisiana*, 379 U.S. 536, 558 (1965). However, the use of the public streets may not be regulated by either statutes which are vague and sweeping in their terms or by statutes which grant unlimited discretion to administrative officials.[23] If the

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[22] *Hague* v. *C.I.O.*, 307 U.S. 496, 515-516 (1939) (opinion of Mr. Justice Roberts). Accord: *Jamison* v. *Texas*, 318 U.S. 413, 416 (1943); *Amalgamated Food Employees Union* v. *Logan Valley Plaza Inc.*, 391 U.S. 308, 315 (1968).

[23] This Court has most frequently considered the problem of overly broad delegation of power to administrative officials in the context of statutes that require that speakers or demonstrators obtain licenses before using the public streets and parks to express their opinions. In *Kunz* v. *New York*, 340 U.S. 290 (1951), the Court reversed a conviction for failure to obtain a license to speak, even though it was not disputed that on prior occasions the speaker had ridiculed and denounced the religious beliefs of others and had caused great disorder by holding meetings in the busy streets of New York City. The conviction could not stand, even though the State would have had legitimate reason to deny Mr. Kunz a license

Maryland disorderly conduct statute is construed to mean that any refusal to obey a policeman's order is presumed to endanger the public peace,[24] it is quite specific but it is unconstitutional under the rule of *Shuttlesworth* v. *City of Birmingham, supra.* If the statute is construed to mean that failure to obey a police order is punishable whenever a jury finds in fact that "the public peace may be endangered," it is unconstitutionally vague and sweeping under *Cox* v. *Louisiana, supra.* We see no alternative to these constructions in the form in which petitioners' case was submitted to the jury.

3. But the police-order theory, as charged below, has an additional vice. It permits the police to call a halt to a demonstration, and permits the jury to convict the demonstrators, on the sole ground that their message disturbs those who witness it. This theory fails to recognize the cardinal point of the First Amendment—embodied in several defense requests for instructions which were refused (see pp. 7-10, *supra*)—that the expression of ideas will

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under a narrowly drawn statute, because the Court had "consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places." *Id.* at 294. See *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940); *Niemotko* v. *Maryland*, 340 U.S. 268 (1951); *Schneider* v. *State*, 308 U.S. 147 (1939); *Hague* v. *C.I.O.*, 307 U.S. 496 (1939); *Lovell* v. *City of Griffin*, 303 U.S. 444 (1938); *Saia* v. *New York*, 334 U.S. 558 (1948); *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147 (1969). And in *Shuttlesworth* v. *City of Birmingham*, 382 U.S. 87 (1965), and *Cox* v. *Louisiana, supra*, the Court made plain that the rule of the licensing cases applies equally to broadly drawn state prohibitory statutes that allow *de facto* (although not *de jure*) licensing power to the police.

[24] *Sharpe* v. *State*, 231 Md. 401, 190 A.2d 628 (1963) may stand for this proposition.

often arouse hostile reactions and that, when this happens, the police have an obligation first to attempt to protect those who are expressing unpopular ideas, before ordering them off the street or arresting them.

In *Cox* v. *Louisiana, supra,* for example, police testified that they feared violence to demonstrators from a crowd of onlookers. The Court replied that, "Conceding this was so, the 'compelling answer . . . is that constitutional rights may not be denied simply because of hostility to their assertion or exercise.' *Watson* v. *Memphis,* 373 U.S. 526, 535." (379 U.S. at 550.) See also *Wright* v. *Georgia,* 373 U.S. 284, 292 (1963) ("The command was also violative of petitioners' rights because . . . the possibility of disorder by others . . . could not justify [their] exclusion . . . from the park").

Maryland's police-order theory of disorderly conduct entirely ignores by its broad "breach of the peace" conception the constitutional duty of police to protect the free expression of ideas. If the ideas expressed by petitioners were sufficiently opposed to the opinions of a majority of the people on Greenmount Avenue to necessitate police protection, then the Constitution demanded that they be given that protection insofar as practicable. This issue, which petitioners' requests to charge would have submitted to the jury, was swept aside by the courts below in their view of Art. 27, § 123. We submit that a statute so construed that it authorizes the police, in the interest of preserving the public peace, to arrest those engaged in the expression of political ideas rather than first attempting by other practicable means to keep the peace, is unconstitutional. *Edwards* v. *South Carolina,* 372 U.S. 229 (1963).

II.

As Applied to Petitioners on the Record of This Case, Article 27, § 123 Abridges the Rights of Free Speech, Petition and Assembly, Guaranteed by the First and Fourteenth Amendments.

A. ARTICLE 27, § 123, PROHIBITING THE DOING OR SAYING OF THAT WHICH DISTURBS OR OFFENDS PEOPLE IN THE AREA, IS UNCONSTITUTIONAL AS APPLIED TO PETITIONERS BECAUSE THE RECORD SHOWS THAT ANY "DISTURBANCE" OCCASIONED TO PEOPLE IN PETITIONERS' AREA AROSE EXCLUSIVELY FROM DISAGREEMENT WITH THE IDEAS THAT THEY EXPRESSED.

1. The arresting officers testified that petitioners were arrested because the crowd of spectators was "hostile"; and, on the whole record, this hostility was the only evidence of the public "disturbance," "offense," "incitement," or "resentment" required to convict. But the record also clearly shows that whatever disturbance, offense, resentment or other reaction may have been aroused in the spectators was entirely based on a disagreement with the petitioners' expression of their views on Viet Nam.

In the testimony of the arresting officers, a major indication of the hostility of the bystanders was the fact that there were two Marines present who seemed to be angry. Lt. DiPino testified that the Marines were angry because the petitioners were opposed to the war.[25] Sgt. DiCarlo,

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[25] "Q. What specific action did the defendants commit that made the crowd hostile? What did they do, in other words, in any way made the crowd hostile? . . .

"A. I don't know. Like I said before, if you want me to repeat—by looking at the Marine and seeing how pale he was. It was one of the indications he was angry.

[footnote 25 cont'd on next page]

when asked to describe the hostility of the crowd, also responded by stating that there were military men present.[35]

The second major sign that the crowd was disturbed and offended was that they began to shout "Bomb Hanoi." (A. 46, 58 [Tr. 90, 114].) Lt. DiPino testified that he "arrested [petitioners] . . . also to protect them from being hurt" (A. 60 [Tr. 117]) and that he knew they needed "protection" because the crowd of spectators and the demonstrators were "debating about the Viet Cong situation." (A. 47-48 [Tr. 93].) "[T]hey were debating back and forth about Bomb Hanoi and different things" (A. 61 [Tr. 119]). "They were protesting and the other ones were protesting against them." (A. 46 [Tr. 90].)

Prosecution witnesses were clear that they did not hear any abusive language from the petitioners. (A. 57-58, 150 [Tr. 112, 351].) Lt. DiPino stated that the crowd was not angry about the failure of petitioners to move from the sidewalk:

"Q. You mean the crowd was mad at them because they wouldn't move?

"A. Because they were marching in protest.

"Q. Angry about what?

"A. Of what was taking place, he was against. Like I said to you before.

"Q. You said the fact these people were protesting the war in Viet Nam and—

"A. And he was a Marine, yes." (A. 64-65 [Tr. 127-128].)

[35] "They started to shout things like 'Let us get to them, we'll take care of them.' There were two United States Marines. We had to hold them. We sent them across the street and also men from the Navy that we sent across the street. And the crowd did gather in around them. So it did start to get a little wild." (A. 39 [Tr. 73].)

"Q. About what?

"A. About the Viet Cong. Against the recruiting station for not allowing signs." (A. 65 [Tr. 130].)

And when asked if any of the hostility of the crowd could be attributed to the actions of petitioners, the officer said, "Yes, they [the crowd] were protesting against them. They didn't like what they were giving out in literature." (A. 62 [Tr. 123].)

Thus it is clear from the testimony of the prosecution witnesses that the only basis for offense, resentment and disturbance felt by the crowd was a disagreement with the ideas expressed by petitioners. To punish them for causing that kind of "disturbance" is to punish them for the crowd's rejection of their anti-war beliefs. Underlying such a conviction, Art. 27 § 123 becomes a bald instrument for the suppression of the freedom of expression protected by the First Amendment.

2. Of course, Lt. DiPino testified that he did not "take sides" (A. 65 [Tr. 130]), and that he felt compelled to "lock them [petitioners] up for their protection" (A. 65 [Tr. 129]). He also testified that he had attempted to disperse the crowd. (A. 51 [Tr. 100].) But State's witness Fogarty did not hear any attempt to disperse the crowd (A. 149-150 [Tr. 350-351]); nor did any of the defense witnesses who were in that crowd (A. 118, 119, 122, 126, 132-133 [Tr. 257, 261, 268-269, 277, 293].) Other than the chant of "Bomb Hanoi," there were apparently only two instances of verbal threats directed against petitioners; and no one of the "hostile" spectators ever tried to charge them, reached out physically to assault them, or assault any of the dozens of other placard-carrying demon-

strators mingling in the crowd. (See pp. 18-19, *supra.*) At all times, concededly, there was adequate police protection on the scene. (See pp. 19-20, *supra.*)

On similar records, this Court has not hesitated to reject factually unsubstantiated professions of policemen that they sensed or anticipated violence. *Edwards* v. *South Carolina,* 372 U.S. 229 (1963); *Wright* v. *Georgia,* 373 U.S. 284 (1963); *Henry* v. *City of Rock Hill,* 376 U.S. 776 (1964). When "a claim of constitutionally protected right is involved, it 'remains [the Court's] . . . duty in a case such as this to make an independent examination of the whole record.'" *Cox* v. *Louisiana,* 379 U.S. 536, 545 n. 8 (1965). Here, such an examination must lead irresistibly to two conclusions: (1) that the hostility of the crowd of spectators was based entirely on disagreement with the petitioners' expressed ideas; and (2) that the police thereupon acted to suppress the ideas rather than undertaking the achievable, if more burdensome, job of controlling the crowd to the extent that was needed in order to "protect" petitioners.

3. These conclusions compel reversal of the convictions. "[A] function of free speech under our system of government is to invite dispute." [27] That petitioners were successful in inviting dispute cannot constitutionally support their punishment. Public disturbance is often a necessary concomitant of the expression of unpopular ideas, and it was the obligation of the police at the recruiting station to protect the petitioners in the exercise of First Amendment freedoms. Instead, petitioners were arrested and "convicted upon evidence which showed no more than that the

[27] *Terminiello* v. *City of Chicago, supra,* 337 U.S. at 4.

opinions which they were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection." *Edwards* v. *South Carolina*, 372 U.S. 229, 237 (1963). We have noted above the obvious point that: "'constitutional rights may not be denied simply because of hostility to their assertion or exercise.'"[28] "[T]he possibility of disorder by others cannot justify exclusion of persons from a place if they otherwise have a constitutional right . . . to be present."[29]

4. In making this submission, we do not "challenge the principle that there are special, limited circumstances in which speech is so interlaced with burgeoning violence that it is not protected by the broad guaranty of the First Amendment." *Carroll* v. *President and Commissioners of Princess Anne*, 393 U.S. 175, 180 (1968). We are quick to concede, for example, that a State's interest in maintaining public order may justify the arrest of a speaker who produces a hostile reaction through the use of "fighting words." *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942). But the record here shows no "fighting words" by petitioners.[30] Rather, it aligns petitioners' case with the many in which *Chaplinsky* has been thought obviously distinguishable.[31]

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[28] *Cox* v. *Louisiana*, *supra*, 379 U.S. at 551; *Watson* v. *City of Memphis*, 373 U.S. 526, 535 (1963).

[29] *Wright* v. *Georgia*, 373 U.S. 284, 293 (1963).

[30] Similarly, *Feiner* v. *New York*, 340 U.S. 315 (1951), is far off point. Feiner was whipping his own supporters up to violence, as the Court noted when distinguishing *Feiner* in *Edwards* v. *South Carolina*, *supra*, 372 U.S. at 236 and *Cox* v. *Louisiana*, *supra*, 379 U.S. at 551. Nothing of the sort is involved here.

[31] *Terminiello* v. *City of Chicago*, *supra*, at 3; *Cox* v. *Louisiana*, *supra*, at 551; *Edwards* v. *South Carolina*, *supra*, at 236; *Niemotko* v. *Maryland*, *supra*, at 281; cf. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 293, 296 (1964) (Mr. Justice Black, concurring).

We have also said at pp. 27-29, *supra,* that we do not challenge or deny Maryland's power to keep its sidewalks unobstructed, as well as peaceful. But the power against obstruction has nothing to do with this case. Petitioners have been convicted *only* of the crime of "disturbing," and "offending" other people, and of "provoking [their] resentment." The record is plain that the *only* disturbance, offense or resentment caused by the petitioners arose when a crowd of spectators disagreed with their anti-Viet Nam views, and that then the police arrested petitioners in preference to controlling the crowd. As applied to these facts, Art. 27, § 123 has the effect, and the exclusive effect, of suppressing expression protected by the First Amendment.

B. The Conviction of Petitioners for Refusing to Obey the Order of an Officer Is Unconstitutional Because the Record Plainly Shows That There Was No Legal Justification for the Order in That There Was No Clear and Present Danger of Substantial Public Disturbance, and That the Order Therefore Operated Solely to Suppress the Expression of Ideas by Petitioners.

We return to the police-order theory of petitioners' conviction. "Obviously, . . . one cannot be punished for failing to obey the command of an officer if that command is itself violative of the Constitution." [32] In the present case any alleged order[33] was unconstitutional because: (1) there was

[32] *Wright* v. *Georgia,* 373 U.S. 284, 291-292 (1963).

[33] Whether any such order was given was hotly contested at the trial. (See pp. 17-20, *supra.*) In light of the alternative theories submitted to support conviction, it is impossible to say whether or how the jury resolved the contest.

no evidence of any clear and present danger of disruption or violence; and (2) whatever danger existed was not attributable to the petitioners but arose solely from public hostility to their views.

1. As mentioned above, the primary indication of danger to the public peace as perceived by the arresting officers was the reaction of a couple of Marines. Lt. DiPino testified that he asked the petitioners to leave when he saw that the Marines were "pale in their face" and he therefore feared violence.[24] He did not testify that the Marines made any threatening gestures or used any threatening words toward petitioners. Indeed, it appears that the Marines were standing next to picketers who were holding signs protesting the war and made no attempt to harm the picketers. (A. 56, 59-60 [Tr. 110, 115-116].) Petitioner Harding testified without contradiction that "there was a Marine standing within five or six feet of me and there was no police officer between myself and the Marine." (A. 98 [Tr. 210].) "And he was watching me, just looking at me." (A. 96 [Tr. 204].) The Marine made no threatening gestures to him. (A. 84 [Tr. 178].) Another defense witness testified that he had spoken with two uniformed Armed Service people and had given them some literature. (A. 137 [Tr. 302].) While

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[24] "Q. Then when is the next time you told them to get up?

"A. When I seen there could be violence. Again I asked, when I seen the two Marines that were pale in their face, why if they're not going to get up they can be hurt. I asked them again. They still wouldn't get up.

"Q. Who were these two Marines standing next to?

"A. I don't know who they were.

behind a man carrying one of the signs?

"Q. Suppose I were to tell you one Marine was standing right

"A. It's possible. I said they were intermingled." (A. 59 [Tr. 115-116].)

they were not happy with the demonstration, their reaction did not betoken impending violence."[18]

In addition to testimony concerning the color of the Marines' faces, the arresting officers made general assertions of "hostility" and said that there were a couple of shouts like "Let me get to them; I'll bust him in the mouth." (A. 48 [Tr. 94]). (See p. 18, *supra*.) On the other hand, Lt. DiPino stated that there were no fights anywhere in the crowd after the boys had been placed on the pavement, and that none of the demonstrators was attacked (A. 61 [Tr. 120].) The police officers estimated the size of the crowd at 80 to 100 people (A. 39 [Tr. 73]) and at 50 to 150 people (A. 45-46 [Tr. 89]). This figure included approximately thirty to forty demonstrators. (A. 22, 60-61 [Tr. 30, 118].) There were more than twelve police officers present, and more

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[18] "A. . . . I remember handing leaflets to these two servicemen and talking to them about Viet Nam.

"Q. What was their respective response to your handing them a leaflet?

"A. Well they didn't really want to talk about it that much.

"Q. Did they say anything else?

"A. . . . All I remember he didn't want to discuss it. He took the leaflet. I don't remember exactly what he said. He wasn't happy about the demonstration. . . .

"Q. What did he say?

"A. I don't remember exactly. General things about Communists and something.

"Q. What do you mean he wasn't happy about the demonstration?

"A. He didn't act like he was going to do anything. He didn't do anything but he didn't look happy about it.

"Q. Was he sad?

"A. No. He looked angry.

"Q. He looked angry?

"A. Yes, sir. But he didn't—I mean it was a controlled thing, you know, very controlled. He wasn't sure what was happening. This was something knew [sic] to him. I hope he went home and thought about it." (A. 137-138 [Tr. 302-304].)

officers could have been called if they were needed. See pp. 19-20, *supra*.

We note again the highly significant fact that the supporters of the war and the people carrying picket signs protesting the war were intermingled in the crowd. (Pp. 18-19, *supra*.) If any member of the crowd had wanted to attack one of the demonstrators there was ample opportunity to do so. Four defense witnesses who were in the crowd testified that they were carrying signs protesting the war during the entire period that petitioners were on the sidewalk and that no one threatened them, cursed them or made any menacing remarks or gestures to them. (A. 114, 118, 119, 123, 133 [Tr. 249-250, 259, 261, 270, 294].) Another defense witness was identifiable as a protester because he was passing out leaflets, yet no one threatened his safety. (A. 126, 127 [Tr. 276-277, 279].) State's witness Fogarty testified that the people at the back of the crowd were trying to push to the front "to see what was going on," but that no one was trying to go past the police to attack petitioners." (A. 150 [Tr. 351-352].)

2. The danger to the public peace shown on these facts is constitutionally insufficient to justify an order that petitioners leave the street. In this aspect, the case is plainly controlled by *Edwards* v. *South Carolina, supra; Thomas* v. *Mississippi*, 380 U.S. 524 (1965), reversing *Thomas* v. *State*, 252 Miss. 527, 160 So.2d 657 (1964); and *Fields* v. *South Carolina*, 375 U.S. 44 (1963), reversing *State* v. *Fields*, 240 S.C. 366, 126 S.E.2d 6 (1962).[36]

[36] The facts in *Fields* are stated in *State* v. *Brown*, 240 S.C. 357, 126 S.E.2d 1 (1962).

The Court considered a far more volatile situation in *Cox* v. *Louisiana, supra,* in which 2000 Negro students demonstrated on the public street. The police testified that they feared violence might erupt in a "tense" situation from a "muttering," "grumbling," "jeering" crowd of 300 white onlookers. When the demonstrators refused to disperse on an order to do so, they were arrested and convicted. Noting that the demonstrators "themselves were not violent and threatened no violence. . . ." 379 U.S., at 550, and finding that the police "could have handled the crowd," *ibid.*, the Court reversed the convictions. The same result is compelled here, for the same reasons.[37]

3. As we have pointed out above, the result is unaffected by the question whether the police might constitutionally have ordered petitioners to move along for the purpose of clearing passage on the sidewalk. Neither under Art. 27, § 123 nor under the police testimony was that the purpose of the order for disobedience of which the petitioners stand convicted. The order was made, and was required to be made under the statute, to prevent a breach of the peace. But so insubstantial was the threat of violence to which the police responded that a "breach of the peace" was either speculative, meaningless, or a euphemism for the crowd's annoyance at the anti-war protest.

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[37] We note again the inapplicability of *Feiner* v. *New York, supra* note 30. In *Feiner,* there were only two policemen to deal with a crowd of seventy-five people that was "pushing, shoving and milling around" (340 U.S. at 317); at least one member of the crowd "threatened violence if the police did not act" (*ibid.*); and the speaker himself passed "the bounds of argument or persuasion and [undertook] . . . incitement to riot" (*id.*, at 321).

III.

The Trial Court Committed Constitutional Error in Refusing Petitioners' Requested Instructions.

1. We have submitted in Part II(A) *supra* that petitioners' convictions must be reversed because the record compels the conclusion that the only "disturbance," "offense," or "resentment" occasioned by their conduct was the wholly ideological disturbance of a crowd of spectators who disagreed with, and were consequently angered by, petitioners' anti-war views. Whether or not the evidence as summarized in Part II(A) *compels* this conclusion, it assuredly *permits* it. On that evidence, the jury *could* have found only ideological disturbance even if (as we now assume *arguendo*) it could alternatively have found something else or more.

On this state of the record, petitioners were obviously entitled to an instruction that, if the jurors took a view of the facts under which there was no disturbance or offense save an ideological one, they should not be convicted. Such an instruction was indispensable if the case was not to go to the jury on an unconstitutional theory, since ideological disturbance or offense could plainly be understood to be included in the court's broad general definition of disorderly conduct as "the doing or saying or both of that which offends, disturbs, incites or tends to incite a number of people gathered in the same area" or "conduct of such nature as to affect the peace and quiet of persons who may witness it and who may be disturbed or provoked to resentment because of it." (A. 155 [Tr. 375-376].)

Petitioners submitted several requested instructions, set out verbatim at pp. 8-10, *supra,* designed to limit this general definition of disorderly conduct consistently with the First Amendment. It would unduly extend this brief to repeat them here. Requested Instructions V and VI state the law of the Constitution as expounded in *Edwards* v. *South Carolina,* 372 U.S. 229 (1963), and *Cox* v. *Louisiana,* 379 U.S. 536 (1965). They are proper statements of the law, applicable to the facts, and necessary qualifications of any theory of criminal liability that purports to permit conviction for disturbing or offending others.

Requested Instruction VII is taken almost word for word from the opinion in *Terminiello* v. *City of Chicago,* 337 U.S. 1, 4-5 (1949). It is taken, in particular, from that passage of the opinion which explains the deficiencies of the jury charge actually given in *Terminiello.* Since the general charge in petitioners' case was almost identical to the *Terminiello* charge, Requested Instruction VII obviously was both proper and necessary.

Failure to give these instructions was palpable constitutional error.

2. So, also, was the failure to give Requested Instructions I through IV or IV-A (A. 12-14). These would have limited the disobeying-a-police-order theory of the trial court's charge—i.e., "A refusal to obey a policeman's command to move on when not to do so may endanger the public peace, may amount to disorderly conduct" (A. 155-156 [Tr. 376])—consistently with *Cox* v. *Louisiana, supra,* and *Shuttlesworth* v. *City of Birmingham,* 382 U.S. 87 (1965). Without these limitations, the charge as given was

clearly overbroad under the holdings of these cases. Therefore, the Requested Instructions were constitutionally required.

Conclusion

Petitioners' convictions should be reversed.

Respectfully submitted,

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